

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

DANIEL RATLIFF,

No. 3:12-cv-02326-HU

Plaintiff,

**FINDINGS AND
RECOMMENDATION**

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

Defendant.

Linda S. Ziskin
P.O. Box 735833
Las Vegas, NV 89136

Martin R. Cohen
4040 Douglas Way
P.O. Box 1229
Lake Oswego, OR 97305

Attorneys for Plaintiff

S. Amanda Marshall
United States Attorney
1000 S.W. Third Avenue, Suite 600
Portland, OR 97201-2902

David J. Burdett
Social Security Administration
701 Fifth Avenue, Suite 2900 M/S 221A
Seattle, WA 98104-7075

Attorneys for Defendant

1 HUBEL, Magistrate Judge:

2 Plaintiff Daniel Ratliff ("Plaintiff") seeks judicial review
3 of a final decision of the Commissioner of Social Security
4 ("Commissioner") denying his application for disability insurance
5 benefits ("DIB") under Titles II the Social Security Act. The only
6 disputed issue on appeal is whether the Administrative Law Judge
7 ("ALJ") erred in concluding, at step five of the five-step
8 sequential evaluation process, that Plaintiff could perform work
9 which exists in significant numbers in the national economy based
10 upon the vocational expert's ("VE") testimony regarding the job of
11 office helper.¹ This Court has jurisdiction to review the
12 Commissioner's decision pursuant to 42 U.S.C. § 405(g). For the
13 reasons that follow, the Commissioner's decision should be
14 affirmed.

15 **I. FACTUAL AND PROCEDURAL BACKGROUND**

16 Plaintiff applied for DIB on November 30, 2009. (Tr. 18.)
17 Plaintiff's application alleged a disability onset date of July 17,
18 2009. (Tr. 18.) The application was denied initially on March 2,
19 2010, and upon reconsideration on May 20, 2010. (Tr. 18.)
20 Plaintiff appeared and testified at a hearing held on May 24, 2011,
21 before ALJ Eleanor Laws. (Tr. 18.) At the time, Plaintiff was a
22

23 ¹ Plaintiff also argued that the ALJ erred when she found that
24 he could perform the job of loss prevention monitor. The
25 Commissioner, however, disclaimed any reliance on the ALJ's
26 conclusion that Plaintiff could perform the job of loss prevention
27 monitor "due to the confusion as to the nature of the actual
28 occupation intended by the VE." (Def.'s Br. at 4.) In the event
the Court disagrees with the Commissioner regarding the job of
office helper, the Commissioner contends that "the case should be
resolved by remanding for further development as to the true
applicability of the occupation of loss prevention monitor to a
person in Plaintiff's circumstances." (Def.'s Br. at 4-5.)

1 forty-six year old high school graduate who was studying business
2 at Portland Community College and served as a tutor at his church.
3 (Tr. 40-41, 55-56, 75.) His work history included time as an
4 aircraft mechanic, painter's assistant, heating, ventilation, and
5 air conditioning ("HVAC") technician, and electrician helper. (Tr.
6 69-74.)

7 At the hearing, the ALJ elicited testimony from the VE. The
8 ALJ asked the VE to consider a person of Plaintiff's age, education
9 and vocational background, who is able to: (1) lift and/ or carry
10 twenty pounds occasionally and ten pounds frequently (extertional
11 limitation); (2) push and/ or pull twenty pounds occasionally and
12 ten pounds frequently (extertional limitation); (3) climb ladders,
13 ropes and scaffolds occasionally (postural limitation); and (4)
14 climb ramps and stairs frequently (postural limitation). (Tr. 76.)
15 After ruling out Plaintiff's past relevant work, the VE testified
16 that an individual with these limitations could, at minimum,
17 perform the light duty, unskilled jobs of repack room worker, light
18 janitorial worker or shelving clerk.² (Tr. 76-79.) The VE also
19 confirmed that these jobs were appropriate for a hypothetical
20 individual limited to simple, routine tasks.³ (Tr. 78-79.)

21 The ALJ then altered the hypothetical by asking the VE to
22 assume that the hypothetical individual described by the ALJ could
23 only: (1) perform simple, routine tasks; (2) balance, stoop, kneel,
24

25 ² The VE was asked to limit her responses to unskilled work
26 because the ALJ wanted to avoid having to assess the
27 transferability of Plaintiff's job skills in light of his age. (Tr.
28 77.)

³ This will be referred to by the Court as the ALJ's first
hypothetical.

1 crouch, crawl, or climb ladders, ropes, scaffolds, ramps and stairs
2 occasionally (postural limitations); and (3) sit or stand two hours
3 in an eight-hour workday (extertional limitations).⁴ (Tr. 80.) The
4 VE testified that an individual with these limitations could
5 perform two unskilled, sedentary jobs that exist in significant
6 numbers in the regional and national economy: an office helper
7 (8,000 positions in Oregon and 320,000 positions nationally) and
8 loss prevention monitor. (Tr. 80.) The VE also confirmed that
9 these jobs were appropriate for a hypothetical individual limited
10 to frequent handling (manipulative limitation), but they would not
11 be appropriate for an individual limited to occasional handling.⁵
12 (Tr. 81.)

13 In a final hypothetical, the ALJ essentially asked the VE to
14 disregard any "extertional or any other limitations" and assume
15 that the hypothetical individual would experience deficits in
16 concentration that would cause the person to "be off task,
17 resulting in production falling below [eighty] percent of the
18 average worker, on average."⁶ (Tr. 81.) The VE testified as
19 follows: "That would preclude sustained gainful work. The
20 [hypothetical] person would not be able to meet the demands of
21 competitive employment." (Tr. 81.)

22
23 ⁴ This will be referred to by the Court as the ALJ's second
24 hypothetical.

25 ⁵ While being questioned by Plaintiff's counsel, the VE
26 confirmed that the job of office helper required the higher
27 standard of frequent handling (two-thirds of the workday), even
28 though she apparently "didn't notice that" the ALJ asked about
whether occasional handling would preclude such work. (Tr. 85.)

⁶ This will be referred to by the Court as the ALJ's third
and/or final hypothetical.

1 After the ALJ's questioning, Plaintiff's counsel altered the
2 second hypothetical already posed to indicate that the hypothetical
3 individual was limited to only occasional contact with coworkers,
4 supervisors and the general public. (Tr. 81-82.) In particular,
5 the VE testified that the job of office helper would require more
6 than occasional contact with coworkers or supervisors. (Tr. 82)
7 ("So when you say occasional and it's restricted to one-third of
8 the day, even though it's casual with coworkers, it just exists.
9 And you have to be open for any interactions with the supervisor,
10 because it's on his terms.")

11 Plaintiff's counsel then posed the following question to the
12 VE regarding her prior testimony: "[Y]ou had mentioned . . . [that]
13 the office helper [job] . . . [is] listed as light in the
14 [Dictionary of Occupational Titles], but recent additions showed
15 significant numbers of sedentary work, and you listed those. What
16 did you mean by that? I mean, the DOT hasn't been published for
17 decades." (Tr. 82.) The VE explained that her statement was based
18 on more up-to-date information from employment statistics, the
19 Occupational Outlook Handbook, the U.S. Census Bureau, and the
20 Bureau of Labor and Industries. (Tr. 83.) These sources,
21 according to the VE, reflect the fact that technological advances
22 have reduced the extertional demands of the office helper position,
23 even though it's listed as light duty under the DOT. (Tr. 83.) In
24 other words, the VE was explaining her deviation from the
25 DOT—namely, why she limited her response to the second
26 hypothetical to sedentary positions (8,000 positions in Oregon), as
27 opposed to light duty position (22,000 to 25,000 positions). (Tr.
28 84.)

1 On June 8, 2011, the ALJ issued a decision denying Plaintiff's
 2 claim for benefits. (Tr. 28.) Plaintiff then requested review of
 3 the ALJ's decision, which was subsequently denied by the Appeals
 4 Council on November 6, 2012. (Tr. 1-3.) As a result, the ALJ's
 5 decision became the final decision of the Commissioner that is
 6 subject to judicial review. (Tr. 1-2.) This appeal followed on
 7 December 26, 2012.

8 II. THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS

9 A. Legal Standard

10 A claimant is considered disabled if he or she is unable to
 11 "engage in any substantial gainful activity by reason of any
 12 medically determinable physical or mental impairment which . . .
 13 has lasted or can be expected to last for a continuous period of
 14 not less than 12 months[.]" 42 U.S.C. § 423(d)(1)(A). "Social
 15 Security Regulations set out a five-step sequential process for
 16 determining whether an applicant is disabled within the meaning of
 17 the Social Security Act." *Keyser v. Comm'r Soc. Sec. Admin.*, 648
 18 F.3d 721, 724 (9th Cir. 2011). Those five steps are as follows:

19 (1) Is the claimant presently working in a substantially
 20 gainful activity? (2) Is the claimant's impairment
 21 severe? (3) Does the impairment meet or equal [one of
 22 the listed impairments]? (4) Is the claimant able to
 perform any work that he or she has done in the past? and
 (5) Are there significant numbers of jobs in the national
 economy that the claimant can perform?

23 *Keyser*, 648 F.3d at 724-25. The claimant bears the burden of proof
 24 for the first four steps in the process. If the claimant fails to
 25 meet the burden at any of those four steps, then the claimant is
 26 not disabled. *Bustamante v Massanari*, 262 F.3d 949, 953-54 (9th
 27 Cir. 2001); *Bowen v. Yuckert*, 482 U.S. 137, 140-41 (1987).

1 The Commissioner bears the burden of proof at step five of the
2 process, where the Commissioner must show the claimant can perform
3 other work that exists in significant numbers in the national
4 economy, "taking into consideration the claimant's residual
5 functional capacity, age, education, and work experience." *Tackett*
6 *v. Apfel*, 180 F.3d 1094, 1100 (9th Cir. 1999). If the Commissioner
7 fails meet this burden, then the claimant is disabled, but if the
8 Commissioner proves the claimant is able to perform other work
9 which exists in the national economy, then the claimant is not
10 disabled. *Bustamante*, 262 F.3d at 954 (citations omitted).

11 **B. The ALJ's Decision**

12 At the first step of the five-step sequential evaluation
13 process, the ALJ found that Plaintiff had not engaged in
14 substantial gainful activity since July 17, 2009, the alleged
15 disability onset date. (Tr. 20.) At the second step, the ALJ
16 found that Plaintiff had the following severe impairments: left
17 ankle arthritis and tendon tear, depression and obstructive sleep
18 apnea. (Tr. 20.)

19 At the third step, the ALJ found that Plaintiff's combination
20 of impairments were not the equivalent of those on the Listing of
21 Impairments.⁷ (Tr. 22.) The ALJ then assessed Plaintiff's
22 residual functional capacity ("RFC") and found he could perform
23 light work, subject to the following limitations: (1) Plaintiff can
24 lift twenty pounds occasionally and ten pounds frequently; (2)

26
27 ⁷ The Listing of Impairments is found at 20 C.F.R. Part 404,
28 Subpart P, Appendix 1, and described at 20 C.F.R. §§ 404.1525,
404.1526, 416.925, 416.926.

1 Plaintiff can walk and stand a total of two hours in an eight-hour
2 workday; (3) Plaintiff can sit a total of six hours in an eight-
3 hour workday; (4) Plaintiff can occasionally climb, crawl, crouch,
4 stoop, bend, and kneel; and (5) Plaintiff can perform only simple,
5 routine tasks. (Tr. 23.)

6 At the fourth step, the ALJ found that Plaintiff is unable to
7 perform any past relevant work as an aircraft mechanic, painter's
8 assistant, HVAC technician, and electrician helper. (Tr. 26.) In
9 light of Plaintiff's age, education, work experience, and RFC, at
10 the fifth step, the ALJ found that there were jobs existing in
11 significant numbers in the national and local economy that he could
12 perform, including an office helper and loss prevention monitor.
13 (Tr. 27.) Based on the finding that Plaintiff could perform jobs
14 existing in significant numbers in the national economy, the ALJ
15 concluded that he was not disabled as defined in the Act from July
16 17, 2009 (the alleged disability onset date), through June 8, 2011
17 (the date of the ALJ's decision). (Tr. 27-28.)

18 III. DISCUSSION

19 A. Standard of Review

20 The court may set aside a denial of benefits only if the
21 Commissioner's findings are "'not supported by substantial evidence
22 or [are] based on legal error.'" *Bray v. Comm'r Soc. Sec. Admin.*,
23 554 F.3d 1219, 1222 (9th Cir. 2009) (quoting *Robbins v. Soc. Sec.*
24 *Admin.*, 466 F.3d 880, 882 (9th Cir. 2006)). Substantial evidence
25 is "'more than a mere scintilla but less than a preponderance; it
26 is such relevant evidence as a reasonable mind might accept as
27 adequate to support a conclusion.'" *Bray*, 554 F.3d at 1222 (quoting
28 *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995)).

1 The court "cannot affirm the Commissioner's decision 'simply
 2 by isolating a specific quantum of supporting evidence.'" *Holohan*
 3 *v. Massanari*, 246 F.3d 1195, 1201 (9th Cir. 2001) (quoting *Tackett*,
 4 180 F.3d at 1097). Instead, the court must consider the entire
 5 record, weighing both the evidence that supports the Commissioner's
 6 conclusions, and the evidence that detracts from those conclusions.
 7 *Holohan*, 246 F.3d at 1097. However, if the evidence as a whole can
 8 support more than one rational interpretation, the ALJ's decision
 9 must be upheld; the court may not substitute its judgment for the
 10 ALJ's. *Bray*, 554 F.3d at 1222 (citing *Massachi v. Astrue*, 486 F.3d
 11 1149, 1152 (9th Cir. 2007)).

12 **B. The ALJ's Step Five Determination**

13 As discussed above, the sole issue for the Court to decide is
 14 whether the ALJ erred when she concluded, at step five, that
 15 Plaintiff could perform work which exists in significant numbers in
 16 the national economy based upon the VE's testimony regarding the
 17 job of office helper.⁸ See generally *Tamayo v. Colvin*, No. 12-cv-
 18 8484, 2013 WL 5651420, at *2 (C.D. Cal. Oct. 11, 2013) ("The
 19 Commissioner's burden . . . is satisfied by showing the existence
 20 of only one job with a significant number of available positions
 21 that the claimant can perform.") (citation omitted).

22 Plaintiff argues that "the VE's testimony as a whole was so
 23 uncertain and reliable [sic] that it is tainted and useless as
 24 substantial evidence upon which the ALJ may base her [s]tep [five]
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26
 27 ⁸ In his reply brief, Plaintiff indicated that he "agree[d]
 28 the job of loss prevention monitor should be stricken from
 consideration [on appeal], leaving only [the job of] office helper
 as a possibility at [s]tep [five]." (Pl.'s Reply at 2.)

1 finding, on any of the jobs suggested by this VE." (Pl.'s Reply at
2 2; Pl.'s Opening Br. at 2.) Citing the ALJ's final hypothetical,
3 Plaintiff also argues that the VE testified that he could not
4 perform the job of office helper. (Pl.'s Opening Br. at 12; Pl.'s
5 Reply at 3.)

6 Taking the latter argument first, the Court disagrees with
7 Plaintiff's characterization of the VE's testimony regarding the
8 job of office helper. With a few minor exceptions, the VE provided
9 clear and concise answers to the questions posed by the ALJ, and
10 the VE asked for clarification when it was necessary. Plaintiff
11 has failed to present a specific and legitimate argument that would
12 warrant the outright rejection of the VE's testimony regarding the
13 job of office helper. Without more, the Court cannot say that a
14 remand to the agency is warranted on this ground.

15 Plaintiff's second argument is that the VE testified he could
16 not perform the job of office helper based on the ALJ's third and
17 final hypothetical. The Court disagrees. At step two, the ALJ
18 concluded that Plaintiff suffered from the severe mental impairment
19 of depression, despite medical evidence to the contrary. (Tr. 20-
20 21.) As the ALJ explained in her written opinion, "the undersigned
21 gives the claimant the benefit of the doubt and finds that
22 depression is a severe impairment. The [RFC] reflects limitations
23 caused by this condition with a limitation to simple routine tasks.
24 Given that the claimant is passing college-level business courses
25 as discussed herein, this limitation is generous." (Tr. 22.)

26 At step three, the ALJ concluded that Plaintiff had moderate
27 difficulties with respect to concentration, persistence or pace.
28 (Tr. 22.) As the ALJ explained in her written opinion,

1 [t]he claimant describes difficulties with memory, focus,
2 and 'zoning out' during conversation. Yet, he earned
3 average to above average grades while taking math and
4 science classes. He also testified that he is a math
5 tutor for children at church.

6

7 . . . Though the claimant's symptoms of depression
8 have waxed and waned since the alleged onset date, the
9 undersigned finds that evidence received at the
10 hearing . . . supports moderate limitations on
11 concentration, persistence, and pace.

12 (Tr. 22-23.)

13 In the next paragraph, the ALJ acknowledged that she is
14 required to set forth "a more detailed assessment" of Plaintiff's
15 RFC, citing Social Security Regulation ("SSR") 96-8p. See SSR
16 96-8p, 1996 WL 374184, at *4 (Jul. 2, 1996) ("The adjudicator must
17 remember that the limitations identified in the 'paragraph B' [such
18 as limitations on concentration, persistence or pace] are not an
19 RFC assessment but are used to rate the severity of mental
20 impairment(s) at steps [two] and [three] of the sequential
21 evaluation process").

22 The ALJ then proceeded to assess Plaintiff's RFC and found,
23 among other things, that he could "perform only simple, routine
24 tasks." (Tr. 23.) The ALJ also made clear that Plaintiff's RFC
25 reflected the degree of limitation she "found in the 'paragraph B'
26 mental function analysis." (Tr. 23.) In formulating the second
27 hypothetical that ultimately served as the basis for the June 8,
28 2011 decision, the ALJ asked the VE to assume that the hypothetical
individual described by the ALJ could only perform simple, routine
tasks. (Tr. 80.)

It's evident from the written opinion and hearing transcript
that the ALJ's limitation to simple, routine tasks reflected the

1 degree of limitation she found in concentration, persistence or
2 pace. As long as the ALJ's decision is supported by the medical
3 evidence, a limitation to simple, routine work can account for
4 moderate difficulties in concentration, persistence or pace. See
5 *Bickford v. Astrue*, No. 09-833-KI, 2010 WL 4220531, at *11-12 (D.
6 Or. Oct. 19, 2010) ("[S]o long as the ALJ's decision is supported
7 by medical evidence, a limitation to simple, repetitive work can
8 account for moderate difficulties in concentration, persistence or
9 pace"); see also *Bruesch v. Colvin*, No. 3:12-cv-01453-HU, 2014 WL
10 287883, at *9 (D. Or. Jan. 23, 2014) (holding that "unskilled
11 instructions" in a hypothetical question posed to the VE adequately
12 incorporated moderate limitations in concentration, persistence, or
13 pace).

14 Plaintiff does not appear to challenge whether a limitation to
15 simple, routine tasks adequately encapsulates his limitation in
16 this area. Instead, he cites the ALJ's third and final
17 hypothetical for the proposition that, "[s]ince a limitation such
18 as 'moderate' must be quantified for the VE, . . . the ALJ properly
19 converted 'moderate' to a [twenty percent] deficit [in Plaintiff's
20 ability to focus]." (Pl.'s Opening Br. at 12; Pl.'s Reply Br. at
21 2-3.) The third hypothetical clearly did not serve as the basis
22 for the ALJ's decision. Nor did it reflect the degree of
23 impairment the ALJ assessed in Plaintiff's concentration,
24 persistence or pace. In addition, the third hypothetical concerns
25 a hypothetical individual whose deficits in concentration would
26 result "in production falling below [eighty] percent of the average
27 worker, on average." (Tr. 80.) That is materially different from
28 the ALJ suggesting that Plaintiff suffered from a twenty percent

1 reduction in concentration, persistence or pace, or that
2 Plaintiff's production is twenty percent below that of an average
3 worker.

4 IV. CONCLUSION

5 For the reasons stated, the Commissioner's decision should be
6 affirmed.

7 V. SCHEDULING ORDER

8 The Findings and Recommendation will be referred to a district
9 judge. Objections, if any, are due **March 17, 2014**. If no
10 objections are filed, then the Findings and Recommendation will go
11 under advisement on that date. If objections are filed, then a
12 response is due **April 3, 2014**. When the response is due or filed,
13 whichever date is earlier, the Findings and Recommendation will go
14 under advisement.

15 Dated this 24th day of February, 2014.

16 /s/ Dennis J. Hubel

17 _____
18 DENNIS J. HUBEL
19 United States Magistrate Judge
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